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Nos. 05-908 and 05-915

FILED
OCT 10 2006
OFFICE OF THE CLERK
SUPREME COURT, U.S.

IN THE

Supreme Court of the United States

PARENTS INVOLVED IN COMMUNITY SCHOOLS,
Petitioner,

v.

SEATTLE SCHOOL DISTRICT NO. 1, *et al.*,
Respondents.

CRYSTAL D. MEREDITH, Custodial Parent and Next Friend of JOSHUA RYAN McDONALD,
Petitioner,

v.

JEFFERSON COUNTY BOARD OF EDUCATION, *et al.*,
Respondents.

ON WRITS OF CERTIORARI TO THE UNITED STATES COURTS OF APPEALS FOR THE NINTH AND SIXTH CIRCUITS

BRIEF OF THE NAACP AS *AMICUS CURIAE* IN SUPPORT OF RESPONDENTS

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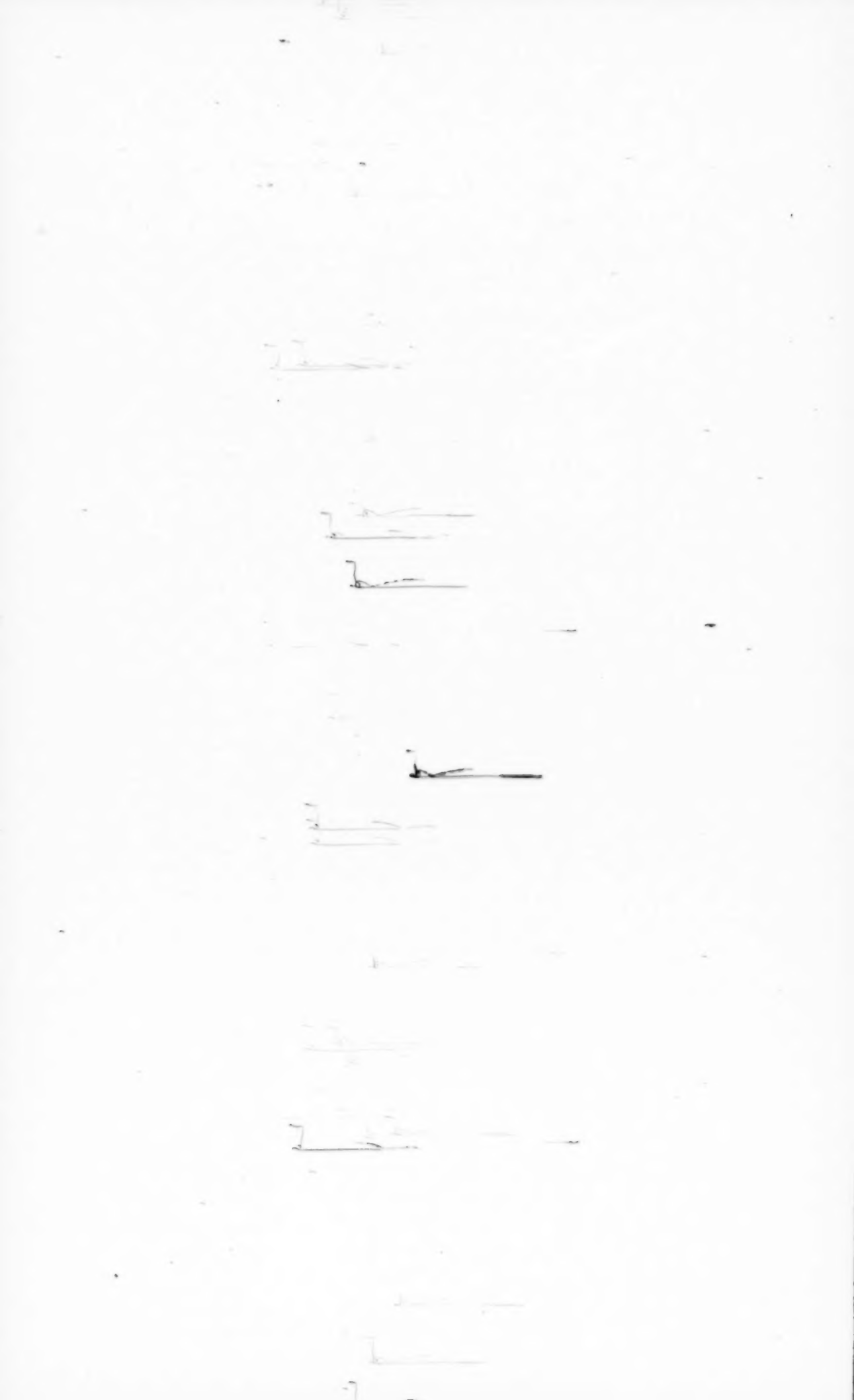

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INTEREST OF THE *AMICUS CURIAE*[1]

The National Association for the Advancement of Colored People ("NAACP"), established in 1909, is the nation's oldest civil rights organization. The NAACP has affiliates and members nationwide, including in Kentucky, Washington and Florida, and in other parts of the world.[2] The fundamental mission of the NAACP is the advancement and improvement of the political, educational, social and economic status of minority groups; the elimination of racial prejudice; the publicizing of adverse effects of discrimination; and the initiation of lawful action to secure the elimination of racial and ethnic bias.

The NAACP has a significant interest in the outcome of this case. The organization is deeply concerned with ensuring excellence as well as equity in public education. Educational opportunity for African Americans has been a fundamental goal of the NAACP since its founding. Within the context of school desegregation, the NAACP works to confront unequal educational outcomes, to eliminate physical segregation and to eliminate "within school" segregation.

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1 Pursuant to Supreme Court Rule 37.6, amicus curiae states that no counsel for any party to this dispute authored this brief in whole or in part, and no person or entity, other than amicus curiae and its counsel, made a monetary contribution to the preparation or submission of this brief. All parties have given blanket consent to the filing of all amicus briefs in this case, in letters of consent filed with the Clerk of this Court.

2 Earlier this year the Eastern Shoshone Indian Tribe at Ft. Washakie, Wyoming became the first Native American tribe to purchase an NAACP corporate membership.

The NAACP has been active in monitoring and litigating issues concerning racial equality in the public education system of the State of Florida, which is the subject of the Brief of Florida Governor John Ellis "Jeb" Bush and the State Board of Education as *Amici Curiae* In Support of Petitioners, Nos. 05-908 & 05-915 ("Florida Governor's brief"). In addition to representing parties or appearing in significant race-related litigation in Florida,[3] NAACP

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[3] *E.g., Fla. ex rel. Hawkins v. Bd. of Control,* 350 U.S. 413 76 S. Ct. 464 (1956) (admission of Negro could not be delayed on basis of considerations applicable to desegregation of public elementary and secondary schools, and Negro was entitled to prompt admission under rules and regulations applicable to other qualified candidates); *Gibson v. Fla. Legislative Investigation Comm.,* 372 U.S. 539, 83 S. Ct. 889 (1963) (state legislative committee empowered to investigate subversive and Communist activities failed to show a substantial connection between local race relations association, a wholly legitimate association, and Communist activities, and was not entitled to compel association president to produce association's membership records); *Sweet v. Childs,* 507 F.2d 675 (5th Cir. 1975) (class action by black public high school students against county and state officials, challenging school disciplinary policies); *NAACP, Inc. v. Fla. Bd. of Regents,* 863 So.2d 294 28 Fla. L. Weekly S815 (Fla. 2003) (civil rights organization had associational standing to challenge State Board of Education rule amendments prohibiting the use of race or gender preferences in admissions); *Bush v. Holmes,* 886 So.2d 340, 29 Fla. L. Weekly D2543 (Fla. Dist. Ct. App. 2004) (facial constitutional challenge to state school voucher program; court held that no-aid provision of State Constitution prohibited indirect benefit to sectarian schools resulting from receipt of funds by such institutions through voucher program), *aff'd in part,* 919 So.2d 392, 31 Fla. L. Weekly S1, S65 (Fla. 2006); *Jacksonville Branch, NAACP v. Duval County Sch. Bd.,* 978 F.2d 1574, 78 Educ. L. Rep. 659 (11th Cir. 1992) ((1) under terms of consent agreement, Organization was required to pursue negotiation remedy before seeking judicial enforcement of agreement's staff assignment provisions; (2) Organization was not entitled to order compelling board to comply with consent agreement's provisions for free transportation of all students); *Jacksonville Branch, NAACP v. Duval County Sch. Bd.,* 883 F.2d 945, 55 Educ. L. Rep. 861 (11th Cir. *(cont'd)*

branches monitor post-unitary status in Florida school districts.[4] A few years ago, the NAACP issued a report card, *Schooling in Florida: Still Unequal* in *Brown 50 Years and Beyond: Promise and Progress—State Data Sheets 10* (NAACP National Education Department 2004) (prepared by the Education Trust for the NAACP 2004).

In 2005 the Florida State Conference of NAACP Branches co-sponsored public hearings along with the Advancement Project and the NAACP Legal Defense and Educational Fund to expose, in part, the connections between disparities in educational opportunities and extreme discipline policies. The hearings were held in Pinellas, Hillsborough, Duval, Palm Beach, Broward and Miami-Dade counties.[5] The hearings concluded that prevention and intervention programs are the most effective methods for maintaining safe schools and creating a productive learning environment. The hearings also revealed a connection between quality of education and school discipline. Across Florida, black

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1989) (evidence concerning racial composition in students and faculty of various schools was insufficient to establish that county school system had achieved unitary status, as required to warrant dissolution of injunction requiring school board to integrate system); *NAACP v. Gadsden County Sch. Bd.*, 691 F.2d 978 7 Educ. L. Rep. 262 (11th Cir. 1982) (evidence supported conclusion that at-large system school board electoral operated to preclude black population, representing substantial percentage of registered Democratic voters in county, from electing a member of its own race to the school board).

[4] *E.g.*, St. Lucie County (Fort Pierce) NAACP (district declared fully unitary in 1997).

[5] *See* NAACP, *Arresting Development: Addressing the School Discipline Crisis in* Florida, *available at* http://www.advancementproject.org/reports/ArstdDvpmES.pdf; *also available at*: http://www.naacpldf.org/content/pdf/pipeline/arresting_development_full_report.pdf.

students struggle with low achievement in terms of low-test scores and graduation rates, as well as high retention and dropout rates. At the same time, these same students face a disproportionately high number of disciplinary actions.

The NAACP, the nation's oldest and largest civil rights organization, files this *amicus curiae* brief on behalf of its members nationwide – indeed, worldwide – to urge this Court to uphold more than fifty years of its precedents designed to ensure school integration and educational opportunity for children of color. The NAACP, together with our members and affiliates in the State of Florida, urge the Court that, contrary to the claims in the Florida Governor's brief, strict race neutrality in elementary and secondary education has not reduced the achievement gap in that State, and that there remain significant disparities among blacks, Hispanics and white students in many phases of learning.

African Americans have been excluded from economic, educational and social opportunities for hundreds of years – both by law and by private custom. For this reason, the NAACP supports the use of reasonable, race-conscious measures, including voluntary desegregation plans, in public schools (K-12). This nation cannot afford to abandon the goal of school integration at this critical phase when many communities are facing the challenges of resegregation and continuing inequality of educational opportunities. The Court should continue to uphold reasonable race- and ethnic-conscious measures to achieve the significant educational benefits that flow from school integration.

SUMMARY OF ARGUMENT

This Court should reject the Florida Governor's suggestion that the promotion of academic achievement is the only legitimate state function with respect to education. While student achievement undoubtedly is a primary goal of

elementary and secondary education, the Florida State Legislature as well as this Court have recognized the important role of elementary and secondary schools also in inculcating important social values. Among these important values is racial and ethnic harmony and appreciation for diverse, plural experiences. Consequently, the Court should not foreclose the ability of school districts to choose to employ the reasonable race-conscious means they prefer to as means of values inculcation.[6]

The Florida Governor's suggestion that strictly race-neutral approaches are adequate, or even better equipped than race-sensitive measures, to maximize student achievement is belied by his own statistics. Florida's school policies are certainly not race neutral in impact, at least if one carefully examines the proffered data contained in the Florida Governor's brief. An analysis of black and Hispanic student access to gifted programs, high school completion rates, retention rate and graduation rates demonstrates just how lacking the State's race-neutral approach has been for minority schoolchildren with respect to these important key markers of academic achievement.

Given the achievement gap between minority and non-minority students that continues to characterize educational achievement in the State of Florida, the Florida Governor's brief prematurely calls for the end of voluntary school integration as a mechanism for improving the quality of education and the life chances for African American and

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[6] If the Court were to recognize diversity or the use of a voluntary desegregation plan as a compelling state interest in high school, Florida would not be precluded from continuing "race neutral" measures. Indeed, *Gratz v. Bollinger*, 539 U.S. 244, 123 S. Ct. 2411 (2003), and *Grutter v. Bollinger*, 539 U.S. 306, 123 S. Ct. 2325 (2003), have not affected California and Washington state restrictions on race-conscious measures.

Hispanic schoolchildren. When the data for Florida used in the Florida Governor's brief is appropriately disaggregated to focus on subgroups, it becomes clear that Florida's race-neutral accountability system embodied in its A+ Plan has failed to benefit all children equally. Hence, the NAACP urges this Court to allow school districts the choice of education policies and to reaffirm the value of integration.

ARGUMENT

I. VALUES INCULCATION IS A LEGITIMATE FUNCTION OF PUBLIC SCHOOLS.

The NAACP submits that values inculcation is a legitimate function of public schools.[7] The Florida Governor attempts to marginalize the "social benefits" and "community benefits" of integration. *See* Florida Governor's Brief at 5, 13, 14. Contrary to the Florida Governor's suggestion that academic achievement is the only or principal legitimate function of public schools, however, this Court repeatedly has noted that an important objective of public education is the inculcation of fundamental values necessary for the maintenance of a democratic political system. *See Hazelwood School District v. Kuhlmeier*, 484 U.S. 260, 272, 274-75 (1988) (noting the importance of

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[7] This does not mean, of course, that various members of the learning community will not occasionally disagree about the appropriate pedagogical approaches to convey certain values, *e.g.*, the debates over the teaching of "scientific creationism" and sex education. In the early 1990's, for example, the Austin, Texas NAACP President sought to speak at a public meeting of a sex education task force appointed by the school district. The task force chair refused to allow the branch president to speak, apparently out of a disagreement with the branch's position on sex education. The speech problem was rectified when, in response to the NAACP's formal complaint, the Texas Education Agency ordered the school board to take remedial steps to correct its unconstitutional behavior.

public elementary and secondary schools in awakening children to cultural values); *id.* at 278 (Brennan, J., dissenting) (stating that public elementary and secondary schools "inculcate[] in tomorrow's leaders the 'fundamental values necessary to the maintenance of a democratic political system...' All the while, the public educator nurtures students' social and moral development by transmitting to them an official dogma of "community values"") (*quoting Board of Education v. Pico ex rel. Pico*, 457 U.S. 853, 864 (1982); *Ambach v. Norwick*, 441 U.S. 68, 77(1979) (citations omitted) (third alteration in original)).

Indeed, this Court has stated:

> The role and purpose of the American public school system was well described by two historians, who stated: "[P]ublic education must prepare pupils for citizenship in the Republic....It must inculcate the habits and manners of civility as values in themselves conducive to happiness and as indispensable to the practice of self-government in the community and the nation." In *Ambach v. Norwick*, we echoed the essence of this statement of the objectives of public education as the "inculcat[ion of] fundamental values necessary to the maintenance of a democratic political system."

Bethel Sch. Dist. No. 403 v. Fraser, 478 U.S. 675, 681 (1986) (quoting Charles A. Beard & Mary R. Beard, *New Basic History of the United States* 228 (1968) (citations omitted) (alterations in original)).

Its protestations notwithstanding, even Florida apparently believes in value inculcation, one form of which is "character education." On February 18, 2000, an employee

of the Florida Department of Education wrote District School Superintendents about the 3rd Annual Florida Conference on Character Education scheduled for April 9-11, 2000 in Altamonte Springs, Florida. The purpose of conference was to assist in implementing character development programs. The official noted, "The 1999 Florida Legislature added character education to Section, 233.061, F.S., required instruction. [*sic*] This requirement calls for all elementary schools to teach character development."[8]

Indeed, even before the Florida Legislature required character education, several districts in Florida, including Escambia, Clay, Lee, Seminole and Martin, had implemented character education programs.[9] Florida described character education as follows:

> Character education is the process of helping young people to develop good character. Specifically, character education is helping young people know, care about, and act on core values such as fairness, honesty, compassion, responsibility, and self-respect.
>
> ....
>
> Our society is split over specific moral issues such as abortion, euthanasia, and capital punishment. However, despite the differences, we are able to identify common

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[8] Memorandum from Betty Coxe to District School Superintendents of 2-18-2000, *available at* http://www.firn.edu/doe/dps/dpsmemo00/00-093.htm.

[9] *See* Florida Department of Education, *Character Education*, Vol. 2, Issue #2, Florida Safe and Drug-Free Schools Notes (1998), *available at* . http://www.unf.edu/dept/fie/sdfs/notes/character_ed.pdf

> core values across cultures and belief systems. It is these core values that are identified, agreed upon, promoted, practiced, and internalized in a character education program.[10]

District diversity and voluntary integration plans are a type of values inculcation. They are an extension of the state's legitimate interest in antiracist, multicultural education. The public school curriculum goes beyond the traditional academic goals of reading, writing and arithmetic, and multicultural education extends beyond the curriculum. A complete education is holistic, addressing the child's development in areas of social skills, workplace skills and critical thinking, nurturing a young person's ability to grow

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[10] *Id.* at 1-2. In discussing strategies for effective character education, the Florida article also notes that any school-wide effort requires that schools and teachers:

> Ask: "What positive character-building experiences is the school already providing for its students? What negative moral experiences (peer cruelty, adult disrespect of students...) is the school failing to address? What important moral experiences (cooperative learning, school and community service, *opportunities to learn about and interact with people from different racial, ethnic, and socioeconomic backgrounds*) is the school now omitting? Including?"

Id. at 6 (emphasis added). The race and ethnic interaction question is appropriate. Florida was ranked 17th among the most segregated states for black students in 2001-2002 with respect to the percentage of blacks in 90-100% minority schools. 31.5% of Florida blacks were in such heavily segregated schools. *See* NAACP, *Brown Fifty Years and Beyond: Promise and Progress Advocacy Report,* at 6 (2004), *available at* http://www.naacp.org/about/resources/publications/education_brown_advocacy_report.pdf (citing 2001-2 NCES Common Core of Data).

in all respects. Certainly the Florida Governor cannot be suggesting that his or his State's support for mainstays of the school experience – such as recital of the Pledge of Allegiance, the singing of the Star Spangled Banner at games, extracurricular activities, including high school sports, or character education – is inappropriate as a matter of educational policy.[11]

School authorities traditionally are charged with broad power to formulate educational policy and could legitimately conclude that race-conscious student selection processes are required to effectuate the district's educational policy goals. Those who run our schools *might* conclude, for example, that in order to prepare students to live in a pluralistic society, each school should have experience with a mix of students according to racial background or national origin. Diversity in the classroom can increase the likelihood that students will discuss racial or ethnic issues and be more likely to socialize with people of different races. Diversity also brings different viewpoints and experiences to classroom discussions and thereby enhances the educational process. Diversity is thus a

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[11] A Florida Department of Education official described Florida's character education legislation in the following manner:

> Such programs must be secular in nature and must stress such character qualities as attentiveness, patience, and initiative. The legislation also amended Section 233.0612, F.S., addressing authorized instruction, to add ethics to the list of subjects a school district may teach.

Memorandum from David Mosrie to District School Superintendents, dated July 30, 1999, *available at* http://www.firn.edu/doe/dps/dpsmemo00/00-004.htm.

valuable resource for teaching students to become citizens in a multi-racial/multi-ethnic world.[12]

Diversity and voluntary desegregation plans also are tools to address and combat the effects of *de facto* segregation. Districts have a legitimate interest in making sure that children are not casualties of the phenomenon of racially isolated housing patterns. The focus here is on the educational benefits of integrated learning environments.

In summary, public schools function beyond reading, writing and arithmetic. A fundamental role of public schools is values inculcation, of which Florida's character education program constitutes one form. School district diversity and voluntary integration plans constitute another form of values inculcation, and districts have at least as much interest in implementing such plans as they might in implementing a character education program.

II. SIGNIFICANT RACIAL DISPARITIES PERSIST IN FLORIDA EDUCATIONAL ACHIEVEMENT.

In the years following *Brown v. Board of Education* until the 1980's, some progress was made in desegregating Florida's schools. But from the 1990's to the present, Florida's schools have been resegregating, particularly in

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[12] *See, e.g.*, on the benefits of an integrated education, the seminal study by A. Wells, J. Holme, A. Revilla and A. Atanda, *How Desegregation Changed Us: The Effects of Racially Mixed Schools on Students and Society* (TEACHERS COLLEGE, COLUMBIA-UNIVERSITY AND UCLA (2004)), *available at* http://cms.tc.columbia.edu/i/a/782_ASWells041504.pdf and the pending book based on the study, *Both Sides Now: the Story of Desegregation's Graduates* (HARVARD UNIVERSITY PRESS 2007); *see also* J. Ryan, *Schools, Race, and Money*, 109 YALE L.J. 249, 257 (1999).

large urban districts, with dire consequences for African American, Hispanic, and low-income students. Beginning in 1999 and continuing to the present, the Florida Governor has retreated from the goal of school desegregation or integration as a strategy to ensure that African American and Hispanic children receive an equal educational opportunity. The State instead has adopted a race-neutral reform called the A+ Plan for education. This plan focuses on standards, testing, and accountability, instead of on educational equity.

The A+ Plan may well be race-neutral in its design. *See* Florida Governor's Brief, at p. 5. However, it is not race-neutral in its effects. The latest research on the effects of the A+ Plan demonstrates that "[u]sing accountability mechanisms to evaluate schools and dole out incentives and disincentives without taking into account the racial distribution of students is clearly unfair and probably will not maximize the efficiency of such initiatives in accomplishing their objectives."[13] As a result of this approach, Florida's African American students, who were once the targets of invidious racial discrimination, are now underrepresented with respect to virtually every positive indicator, and overrepresented with respect to most negative indicators of student academic achievement.

This brief examines increasing racial disparities in retention rates, high school completer rates, graduation rates, and access to gifted programs, using the same data set that the Florida Governor's brief uses.[14] The data demonstrates

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[13] K. Borman, D. Michael, D. Eitle, R. Lee, et al., *Accountability in a Postdesegregation Era: The Continuing Significance of Racial Segregation in Florida's Schools*, 41:3 AM. EDU. RES. J. (2004), *available at* 2004 WLNR 15850705.

[14] The professor and researcher who provided expert analysis for this brief used a standard methodology of collecting data files available *(cont'd)*

that recent reforms have neither improved educational quality nor educational equity in Florida. Instead, they have had a disparate racial impact on black and brown students. Contrary to the claims of the Florida Governor, the State of Florida is experiencing a significant – and in many respects *widening* – achievement gap, especially as between African American and white students.

A. Increased Racial Disparities in High School Completion Rates

An analysis of statewide education shows that more Florida students completed high school in recent years – up from 109,954 in 2000 to 141,436 in 2005. *See* Table I, Appendix ("A") at A-1. Much of this increase may be attributed to Florida's overall population growth during the same time period. However, just as the No Child Left Behind Act requires school systems to report test score data disaggregated by student race and ethnicity to expose ethnic variations in performance, it is necessary to disaggregate Florida high school completion data by race and ethnicity in order to determine if there has been a disparate impact on diplomas received by race in light of Florida's A+ program.

When we disaggregate the types of diplomas received by different racial and ethnic groups, we can see where race

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(cont'd from previous page)

on the Florida Department of Education website. They downloaded the data into Microsoft Excel format to produce the information in the tables of the attached appendices and to present the analysis in the brief. The educational researchers include Kathryn M. Borman, Ph.D., Professor, and Reginald S. Lee, M.A., Senior Research Associate, University of South Florida. The Florida pubic data sources include: http://www.firn.edu/doe/eias/eiaspubs/xls/gradrate.xls *and* http://www.firn.edu/doe/eias/eiaspubs/xls/esemem0506.xls.

matters. There are striking and statistically significant ethnic and racial differences in the type of diplomas awarded to students. The analyses reveal that despite an overall increase in the number of diplomas conferred, the racial achievement gap actually widened in ever category of high school completion.

The State of Florida awards two basic categories of diplomas – the Standard Diploma and other special types lumped together as Total Special Diplomas and Certificates. The Standard Diploma, the most desirable type of diploma, is awarded only to those who earn passing grades on Florida's high stakes assessment test (the Florida Comprehensive Assessment Test or "FCAT"), and who pass the requisite number of courses. Other types of diplomas – Special Diplomas, Certificates of Completion, and Special Certificates of Completion are collectively referred to as Total Special Diplomas and Certificates. These Total Special Diplomas do not qualify students for college admissions. Students who receive these Special Diplomas have "completed", but not "graduated" from high school. In addition, the Special Diplomas send a strong signal to employers that the student was not proficient on Florida's standardized tests. Without a standard diploma, a student's lifetime employment chances are seriously diminished and certainly he or she is less likely to pursue post-secondary educational opportunities and many types of high paying permanent jobs.

The overall declining rates of Standard Diploma awards for all racial groups and the increasing racial gaps in Special Diploma and Standard Diploma awards flatly refute the claims in the Florida Governor's brief that recent reforms have improved outcomes across-the-board for all students, let alone for students of color. Thus, they cannot be characterized as race neutral in their impact.

1. Standard Diplomas

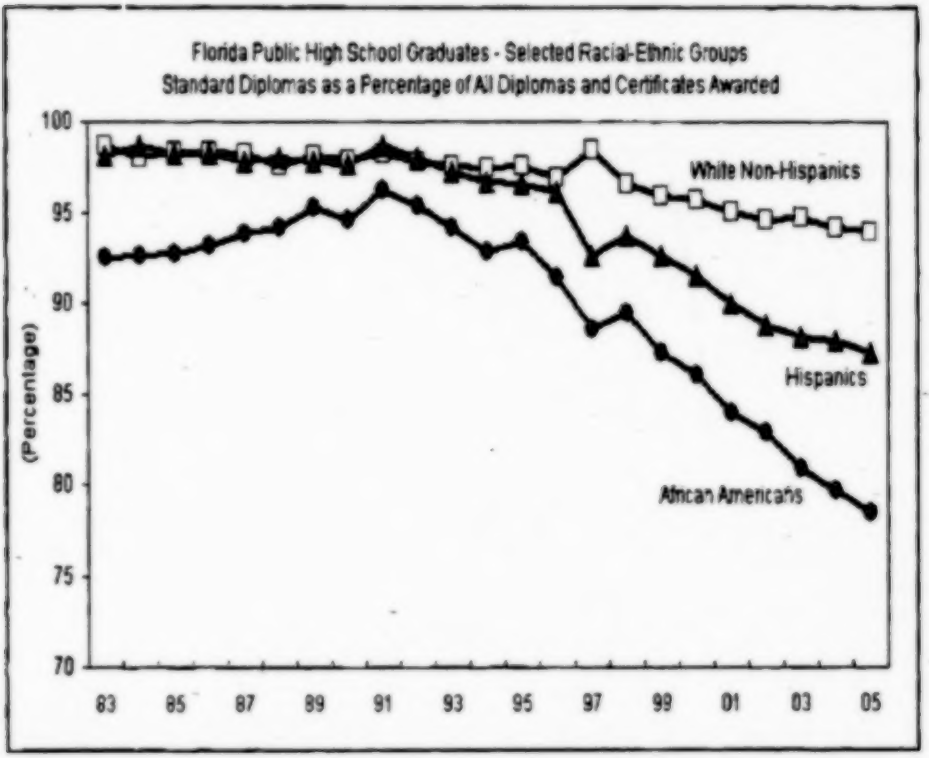
Since implementation of the A+ Education Plan in Florida, proportionally fewer Florida students in every racial group earned Standard Diplomas. Even worse, racial and ethnic gaps among students present in 2000 grew significantly larger during the next five years.

The percent of all students completing the Standard Diploma decreased steadily from 92.9% in 1999-2000 to 89.3% in 2005. *See* A-1. Across all ethnic groups, a smaller proportion of Florida students were awarded a Standard Diploma in 2005 than in 2000. *Id.* Yet, African American and Hispanic students represent most of this downward trend.

Between 2000 and 2005, the percentage of white students who received a standard diploma decreased 1.7 percentage points (down to 94% from 95.7%.). *Id.* During the same period, the percentage of African American students receiving this same diploma decreased by 8.4 percentage points (down to 78.4% from 86.8%). *Id.* This means the White/African American gap in Standard Diploma awards increased from 8.9% to 15.6% since the A+ Plan has been in effect.

While 92% of Hispanics were awarded the Standard Diploma in 2000, only 87.3% received this diploma in 2005. *Id.* Thus, the White/Hispanic gap in Standard Diploma awards also increased from 3.7% in 2000 to 6.7% in 2005.

The following chart (taken from the Florida Department of Education's own documents) illustrates graphically and vividly the downward trend in Standard Diplomas.[15]



The increasing race gaps in Standard Diploma awards between blacks and whites and between Hispanics and whites refutes the Florida Governor's claims that recent reforms have improved outcomes and are race neutral in their impact.

2. Total Special Diplomas

While they are being increasingly denied *Standard Diplomas*, students of color are increasingly awarded the

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[15] *Five Year Graduation Rates by Gender, 2003-2004 Through 2004-06*, http://www.firn.edu/doe/eias/eiaspubs/xls/gradrate.xls

inferior *Special Diplomas*. And, again, they are leading the negative trend.

While only 13.19% of African American students were awarded Total Special Diplomas when the A+ Plan began in 2000, approximately 21.56% received these substandard diplomas by 2005. A similar increase occurred for Hispanics, with 7.97% being awarded the Standard Diploma in 2000 compared to 12.73% in 2005. *See* A-1.

Meanwhile, 4.32% of white students were awarded Total Special Diplomas in 2000 compared to 6.0 % in 2005. This means the white and African American gap in Total Special Diplomas awards also *increased **from*** 8.9% in 2000 to 15.6% in 2005. The white and Hispanic gap in Standard Diploma awards also *increased* from 3.7% in 2000 to 6.7% in 2005.

B. Increased Racial Disparities in Retention Rates in Florida Schools

An analysis of retention data in Florida school districts during the 2003-2004 period indicates that, compared to their white peers, both African American and Hispanic students are retained at higher rates. *See* A-3 (state-wide data).

Across the state of Florida, African American students *are more than twice as likely* to be retained as white students. In fact, 12.3 % of African American as compared with 5.9 % of white students were retained in this one year alone. Hispanic students' retention rate is 8.9 % statewide. If one considers that these data represent just one year of retentions, then the disparate cumulative effect of the state retention policy on the educational opportunities of African Americans in particular is much larger than this snap shot implies. If on average more than one in ten black students in the state is not going on to the next grade each year, over the span of their

K-12 educational career, far too many black children in Florida will be left behind under the current policy regime.

The district-level data is even more disturbing. African American students are retained in grade at higher rates than their white peers in 57 of Florida's 67 county-wide school districts. The same is true for Hispanic students in 49 of the 67 districts. In some cases, as in Okeechobee County, the data demonstrates startling large differences in the rates of retention across racial/ethnic groups. In this district, the gap between white and African American students' retention rates is more than 13% for the 2003-2004 school year alone. In Gulf County, the gap between white and Hispanic students' retention rate exceeded an alarming 17%. These data directly challenge the position of the Florida Governor's brief, which asserts that Florida's reform policies are race neutral in both their design and impact.

C. Gifted Programs

Gifted educational programs generally provide extra resources and enriched learning opportunities for children. But in Florida, racially disparate placement rates deny African American students equal access to gifted education programs; thus, they are denied an equal educational opportunity. On average, a white child attending public schools in the state of Florida is over three times more likely to be placed in a gifted and talented educational program than the average black student. *See* A-4 toA-6. Indeed, across the state, less than 2 percent of all African American students are identified as "gifted" and granted access to supplemental gifted education services.

In some Florida counties, less than a fifth of one percent of the black students enrolled are identified as gifted. In addition, in some counties the gap between the percentage of black students and the percentage of white students identified as gifted is as high as 12 %, meaning that in these

counties, a white child is four times more likely to be placed by the school district in a gifted education program than a black student in the same district. Meanwhile, in only one of Florida's 67 counties does one find a higher percentage of black students than white students enrolled in coveted gifted educational programs.

Overall, the average white student attending public schools in Florida is only somewhat more likely than an Hispanic student to be placed in a gifted program. However, in some school districts white students are seven times more likely to be in the gifted education program.

D. Improving Outcomes For All

The Florida Governor's *amicus* brief correctly points out that high school graduation rates are increasing across the board for all racial groups. However, it does not reveal that, despite the overall upward trend, the racial gap has not only been preserved, it has *widened*: rates for black students continue to lag behind those for white students. Specifically, from 2001 to 2005 the graduation rate for white students rose from 71% to 80% (an increase of 9 percentage points), yet the graduation rate for black students increased from 51% to 57% (up only 6 percentage points). *See* A-7.

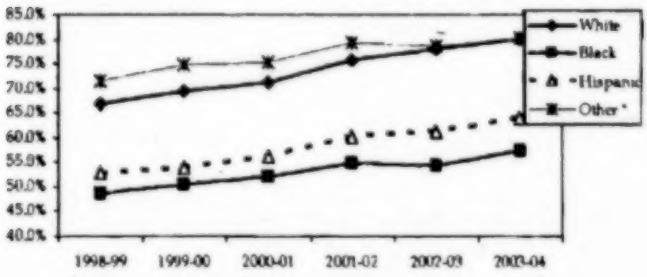
While the overall progress is commendable in some respects, the figures for black students remain deplorable. Moreover, these figures actually indicate a *widening* of the gap in this important marker of educational progress. As the next graph illustrates, the gap in graduation rates between

blacks and whites grew from 19 to 23 percentage points during the three-year period from 2001 to 2004.[16]

Improvement for All Racial/Ethnic Groups—Not only have rates improved for the overall population, they have improved for every racial/ethnic group during the period from 1998-99 to 2003-04, the latest year for which complete results are available (see figure 21).

Figure 21

Florida High School Graduation Rates by Race, 1998-99 to 2003-04



* "Other" contains Asian, American Indian, and multi-racial students.

	White	Black	Hispanic	Asian	Am. Indian	Multiracial	Total
1998-99	66.9%	48.7%	52.8%	73.4%	61.7%	64.7%	60.2%
1999-00	69.4%	50.6%	53.7%	77.4%	65.1%	64.8%	62.3%
2000-01	71.2%	51.9%	56.0%	77.5%	68.8%	68.4%	63.8%
2001-02	75.9%	54.9%	60.1%	82.0%	70.0%	74.1%	67.9%
2002-03	78.1%	54.2%	61.1%	81.0%	72.1%	73.8%	69.0%
2003-04	80.1%	57.3%	64.0%	82.3%	73.2%	78.1%	71.6%

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[16] A report to the U.S. Department of Education (May 2005) by the State of Florida, John L. Winn, Commissioner, *Raising Student Achievement: Florida's Compelling Evidence*, p.18, *available at* http://www.ed.gov/admins/lead/account/growthmodel/fl/flachievement.pdf.

The difference in graduation rates among white, black, and Hispanic students is graphically obvious in Figure 21 above. Furthermore, the data table indicates the white-black gap as 18.2 (66.9 % – 48.7 %) in 1998-1999 and increasing to 22.8 (80.1 – 57.3) in 2003-2004. Similarly the white-Hispanic gap is 14.1 (66.9 % – 52.8 %) in 1998-1999 and increases somewhat by 2003-2004 to 16.1 (80.1% – 64.0 %).

While the State of Florida is correct in its subheading for this graph, "Improvement for All Racial/Ethnic Groups," the gap has widened, we submit, largely due to the use of race-neutral measures as opposed to race-conscious measures. The standards for academic achievement should be the same for all; to be satisfied with a widening gap would suggest that black students should always be relegated to relative mediocrity, even if the bar is raised.

* * *

Given the data set forth above, the reports in the Florida Governor's brief regarding aggregate educational progress distort the reality of widening gaps in Standard Diploma awards, retention in school, and access to gifted programs for African American and Hispanic schoolchildren in the state. Clearly, the state's own educational achievement data fail to document the brief's exaggerated claims of race-neutral results of "Florida's across-the-board progress" for all children. Florida Governor's brief at 5.

Moreover, no evidence beyond the unsubstantiated rhetoric in the Florida Governor's brief demonstrates that prohibiting reasonable voluntary measures to promote integration and reduce the trend of re-segregation somehow *increase* educational achievement for minority children. In fact, racially disaggregated data from Florida show that just the opposite is true. The "race-neutral" A+ Plan has been anything but race-neutral: the results in this section show that racial gap in school outcomes has increased in Florida.

Schools and districts that do well for some students and not others cannot claim success through race-neutral programs unless their results actually close the gap between poor and non-poor, minority and non-minority children. Whereas here, school districts find that their race-neutral programs have unintended racially disparate consequences, they should have the autonomy to exercise sound educational

discretion in selecting a scientifically proven successful remedy of voluntary school integration with racial and ethnic conscious factors to improve education achievement for minority children, where necessary and appropriate.

CONCLUSION

The NAACP as *amicus curiae* respectfully requests that this Court affirm the decisions of the courts below.

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APPENDIX

Appendix

Florida High School Completers
By Type of Diploma/Certificate

						Percentage				
	1 Standard Diploma	2 Special Diploma	3 Certificate of Completion	4 Special Cert. Of Completion	5 Total	6 Standard Diploma (1/5)	7 Special Diploma (2/5)	8 Certificate of Completion (3/5)	9 Special Cert Of Completion (4/5)	10 Total Spec. Dip/Cert (7+8+9)
All Graduates*										
1999-2000	102,177	3,781	3,839	157	109,954	92.9	3.44	3.49	0.14	7.07
2000-01	106,128	4,653	4,762	133	115,676	91.7	4.02	4.12	0.11	8.25
2001-02	113,595	5,638	5,486	110	124,832	91.0	4.52	4.40	0.09	9.00
2002-03	120,612	6,108	6,224	114	133,058	90.6	4.59	4.68	0.09	9.35
2003-04	124,756	6,242	7,552	131	138,681	90.0	4.50	5.45	0.09	10.04
2004-05	126,382	6,463	8,534	77	141,436	89.3	4.57	6.03	0.05	10.66
Whites										
1999-2000	62,441	1,813	917	91	65,262	95.7	2.78	1.41	0.14	4.32
2000-01	63,542	2,136	1,127	70	66,875	95.0	3.19	1.69	0.10	4.98
2001-02	67,585	2,634	1,181	57	71,457	94.6	3.69	1.65	0.08	5.42
2002-03	71,985	2,856	1,049	63	75,953	94.8	3.76	1.38	0.08	5.22
2003-04	73,418	2,883	1,530	62	77,893	94.3	3.70	1.96	0.08	5.75
2004-05	73,175	3,012	1,621	41	77,849	94.0	3.87	2.08	0.05	6.00
African Americans										
1999-2000	20,740	1,248	1,866	38	23,892	86.8	5.22	7.81	0.16	13.19
2000-01	21,509	1,859	2,223	42	25,633	83.9	7.25	8.67	0.16	16.09
2001-02	22,548	2,153	2,553	29	27,281	82.6	7.89	9.36	0.11	17.36
2002-03	23,082	2,347	3,058	37	28,524	80.9	8.23	10.72	0.13	19.08
2003-04	23,439	2,362	3,594	43	29,438	79.6	8.02	12.21	0.15	20.38
2004-05	23,519	2,366	4,076	23	29,984	78.4	7.89	13.59	0.08	21.56
Hispanics										
1999-2000	15,440	357	951	19	16,777	92.0	2.13	5.73	0.11	7.97
2000-01	17,197	609	1,290	17	19,113	90.0	3.2	6.7	0.09	10.02
2001-02	19,117	785	1,613	21	21,536	88.8	3.65	7.49	0.10	11.23
2002-03	20,943	863	1,941	14	23,761	88.1	3.63	8.17	0.06	11.86
2003-04	22,817	895	2,199	24	25,935	88.0	3.45	8.48	0.09	12.02
2004-05	24,058	974	2,525	10	27,567	87.3	3.53	9.16	0.04	12.73

*Includes only the 67 county school districts.

Data Source:
http://www.firn.edu/doe/eias/dataweb/database_0506/student_0506/st56_1_2.pdf

Retention Rates in Florida School Districts 2003-2004

District	White (W)	Black (B)	Hispanic (H)	W-B diff	W-H diff	B-W ratio	H-W ratio
Alachua	4.4%	11.2%	6.4%	-6.8%	-2.1%	2.557	1.476
Baker	7.4%	11.7%	10.7%	-4.3%	-3.3%	1.585	1.455
Bay	6.3%	9.5%	10.7%	-3.2%	-4.4%	1.515	1.703
Bradford	9.5%	10.2%	15.5%	-0.7%	-6.0%	1.074	1.638
Brevard	7.0%	13.7%	11.4%	-6.7%	-4.4%	1.947	1.624
Broward	5.4%	12.8%	7.6%	-7.4%	-2.2%	2.380	1.408
Calhoun	6.2%	6.8%	5.6%	-0.6%	0.6%	1.092	0.896
Charlotte	3.3%	5.3%	4.4%	-2.0%	-1.0%	1.588	1.313
Citrus	6.5%	10.6%	7.2%	-4.0%	-0.6%	1.616	1.099
Clay	4.5%	6.0%	7.1%	-1.4%	-2.5%	1.317	1.560
Collier	3.5%	9.0%	8.9%	-5.5%	-5.4%	2.590	2.551
Columbia	9.7%	12.9%	9.7%	-3.3%	-0.1%	1.340	1.005
Dade	4.3%	10.3%	7.5%	-6.0%	-3.2%	2.386	1.742
Desoto	6.0%	7.2%	6.3%	-1.2%	-0.3%	1.194	1.050
Dixie	9.9%	10.1%	10.7%	-0.2%	-0.8%	1.019	1.081
Duval	9.2%	16.2%	14.8%	-6.9%	-5.6%	1.751	1.603
Escambia	5.3%	10.3%	5.4%	-5.0%	-0.1%	1.947	1.028
Flagler	3.6%	7.3%	4.7%	-3.7%	-1.1%	2.037	1.296
Franklin	9.8%	12.2%	0.0%	-2.4%	9.8%	1.242	0.000
Gadsden	17.5%	18.8%	15.1%	-1.3%	2.5%	1.074	0.859
Gilchrist	8.4%	18.6%	10.2%	10.2%	-1.8%	2.220	1.215
Glades	8.6%	11.3%	10.1%	-2.6%	-1.4%	1.303	1.163
Gulf	5.0%	7.1%	22.2%	-2.1%	17.2%	1.414	4.437
Hamilton	9.9%	13.7%	15.4%	-3.9%	-5.6%	1.393	1.566
Hardee	6.4%	8.2%	11.3%	-1.8%	-4.9%	1.273	1.759
Hendry	4.4%	5.7%	7.8%	-1.4%	-3.4%	1.313	1.779
Hernando	9.3%	12.5%	11.1%	-3.2%	-1.9%	1.348	1.200
Highlands	7.1%	11.8%	11.3%	-4.7%	-4.2%	1.667	1.598
Hillsborough	5.2%	10.3%	10.2%	-5.1%	-5.0%	1.975	1.958
Holmes	6.3%	8.4%	7.3%	-2.1%	-1.0%	1.325	1.154
Indian River	2.5%	5.8%	7.0%	-3.4%	-4.5%	2.365	2.821
Jackson	6.7%	10.3%	11.8%	-3.6%	-5.1%	1.530	1.755
Jefferson	17.3%	19.8%	20.0%	-2.5%	-2.7%	1.142	1.153
Lafayette	3.5%	6.3%	9.5%	-2.8%	-6.0%	1.796	2.737
Lake	4.9%	9.7%	9.2%	-4.8%	-4.4%	1.981	1.894
Lee	5.8%	13.7%	11.3%	-7.8%	-5.4%	2.341	1.929
Leon	6.0%	14.1%	9.0%	-8.1%	-3.1%	2.358	1.511
Levy	6.5%	10.7%	7.5%	-4.2%	-1.0%	1.649	1.160
Liberty	8.2%	10.3%	16.7%	-2.1%	-8.5%	1.257	2.040
Madison	9.5%	15.9%	22.2%	-6.4%	12.7%	1.678	2.342
Manatee	4.8%	10.8%	12.4%	-6.0%	-7.5%	2.236	2.550
Marion	9.1%	13.7%	12.5%	-4.6%	-3.4%	1.500	1.375
Martin	2.2%	6.4%	6.4%	-4.1%	-4.2%	2.864	2.896
Monroe	7.0%	9.6%	11.7%	-2.6%	-4.7%	1.369	1.667
Nassau	5.6%	8.0%	3.4%	-2.4%	2.2%	1.432	0.611
Okaloosa	5.6%	12.6%	8.1%	-7.0%	-2.5%	2.250	1.447
Okeechobee	7.0%	20.2%	9.1%	13.2%	-2.1%	2.898	1.302
Orange	6.8%	14.5%	11.4%	-7.7%	-4.6%	2.126	1.672
Osceola	5.4%	8.3%	7.6%	-2.9%	-2.2%	1.545	1.413
Palm Beach	6.4%	15.5%	11.8%	-9.1%	-5.4%	2.415	1.835
Pasco	5.8%	10.1%	9.0%	-4.3%	-3.2%	1.735	1.549

A-3

District	White (W)	Black (B)	Hispanic (H)	W-B diff	W-H diff	B-W ratio	H-W ratio
Pinellas	5.3%	10.7%	8.0%	-5.3%	-2.6%	2.003	1.496
Polk	7.4%	11.1%	12.0%	-3.6%	-4.5%	1.485	1.610
Putnam	8.1%	11.5%	11.9%	-3.4%	-3.8%	1.423	1.474
St. Johns	2.9%	6.0%	4.9%	-3.0%	-2.0%	2.027	1.664
St. Lucie	5.0%	9.3%	8.0%	-4.3%	-3.0%	1.862	1.602
Santa Rosa	4.2%	6.0%	4.5%	-1.8%	-0.4%	1.438	1.092
Sarasota	6.0%	11.4%	8.9%	-5.4%	-2.8%	1.887	1.469
Seminole	4.6%	11.0%	9.0%	-6.4%	-4.3%	2.373	1.938
Sumter	5.5%	11.8%	6.1%	-6.3%	-0.6%	2.156	1.119
Suwannee	7.7%	11.3%	10.4%	-3.6%	-2.7%	1.467	1.354
Taylor	10.8%	12.2%	6.3%	-1.4%	4.6%	1.125	0.578
Union	7.0%	11.1%	14.0%	-4.1%	-7.0%	1.578	1.998
Volusia	5.7%	10.3%	9.2%	-4.6%	-3.5%	1.796	1.609
Wakulla	6.7%	9.6%	5.9%	-2.9%	0.9%	1.427	0.874
Walton	7.4%	11.7%	11.5%	-4.3%	-4.2%	1.590	1.569
Washington	3.2%	6.9%	9.4%	-3.7%	-6.2%	2.146	2.911
State-wide	5.9%	12.3%	8.9%	-6.4%	-3.0%	2.075	1.508

Data Source:
http://www.firn.edu/doe/eias/eiaspubs/xls/retentions.xls

Enrollment in Programs for Students with Gifts and Talents

	Gifted Placement Rate			Odds Ratio	
District	**White**	**Black**	**Hispanic**	**W/B**	**W/H**
Alachua	0.1677	0.0383	0.1182	4.38	1.42
Baker	0.0166	0.0016	0.0714	10.51	0.23
Bay	0.0187	0.0017	0.0090	10.79	2.06
Bradford	0.0291	0.0054	0.0517	5.37	0.56
Brevard	0.0730	0.0184	0.0480	3.96	1.52
Broward	0.0587	0.0175	0.0366	3.36	1.60
Calhoun	0.0332	0.0414	0.0000	0.80	
Charlotte	0.0370	0.0179	0.0135	2.07	2.74
Citrus	0.0562	0.0217	0.0340	2.59	1.65
Clay	0.0364	0.0087	0.0209	4.18	1.74
Collier	0.0669	0.0251	0.0315	2.66	2.12
Columbia	0.0095	0.0014	0.0224	6.79	0.43
Dade	0.1467	0.0352	0.0703	4.17	2.09
Desoto	0.0223	0.0068	0.0050	3.27	4.42
Dixie	0.0039	0.0000	0.0000		
Duval	0.0433	0.0104	0.0287	4.15	1.51
Escambia	0.0645	0.0192	0.0579	3.36	1.11
Flagler	0.0436	0.0230	0.0125	1.90	3.48
Franklin	0.0132	0.0000	0.0000		
Gadsden	0.0351	0.0141	0.0075	2.48	4.70
Gilchrist	0.0631	0.0088	0.0339	7.13	1.86
Glades	0.0476	0.0066	0.0106	7.19	4.50
Gulf	0.0731	0.0142	0.1111	5.16	0.66
Hamilton	0.0024	0.0000	0.0062		0.39
Hardee	0.0489	0.0144	0.0049	3.39	10.02
Hendry	0.0328	0.0057	0.0121	5.73	2.70
Hernando	0.0282	0.0098	0.0167	2.88	1.69
Highlands	0.0399	0.0102	0.0154	3.91	2.59
Hillsborough	0.0575	0.0126	0.0212	4.57	2.71

	Gifted Placement Rate			Odds Ratio	
District	**White**	**Black**	**Hispanic**	**W/B**	**W/H**
Holmes	0.0013	0.0000	0.0000		
Indian River	0.0736	0.0355	0.0613	2.07	1.20
Jackson	0.0296	0.0015	0.0368	20.40	0.81
Jefferson	0.0087	0.0032	0.0000	2.70	
Lafayette	0.0103	0.0000	0.0119		0.87
Lake	0.0281	0.0084	0.0179	3.35	1.58
Lee	0.0912	0.0405	0.0537	2.25	1.70
Leon	0.0894	0.0111	0.0492	8.04	1.81
Levy	0.0532	0.0123	0.0214	4.31	2.48
Liberty	0.0010	0.0000	0.0000		
Madison	0.0437	0.0106	0.0000	4.13	
Manatee	0.0542	0.0207	0.0239	2.62	2.27
Marion	0.0417	0.0116	0.0248	3.59	1.68
Martin	0.0452	0.0092	0.0162	4.92	2.79
Monroe	0.0432	0.0074	0.0241	5.85	1.79
Nassau	0.0304	0.0066	0.0068	4.58	4.47
Okaloosa	0.0448	0.0047	0.0169	9.50	2.64
Okeechobee	0.0304	0.0102	0.0115	2.99	2.63
Orange	0.0902	0.0140	0.0228	6.43	3.96
Osceola	0.0094	0.0037	0.0035	2.57	2.68
Palm Beach	0.0691	0.0153	0.0271	4.51	2.55
Pasco	0.0355	0.0195	0.0189	1.82	1.88
Pinellas	0.0611	0.0141	0.0257	4.34	2.38
Polk	0.0460	0.0205	0.0240	2.25	1.92
Putnam	0.0367	0.0163	0.0365	2.25	1.01
St. Johns	0.0419	0.0095	0.0414	4.39	1.01
St. Lucie	0.0525	0.0202	0.0275	2.60	1.91
Santa Rosa	0.0409	0.0156	0.0309	2.62	1.32
Sarasota	0.1261	0.0359	0.0623	3.51	2.02
Seminole	0.0742	0.0225	0.0251	3.30	2.95
Sumter	0.0242	0.0060	0.0181	4.04	1.34
Suwannee	0.0108	0.0011	0.0036	10.00	2.99

	Gifted Placement Rate			Odds Ratio	
District	**White**	**Black**	**Hispanic**	**W/B**	**W/H**
Taylor	0.0497	0.0127	0.0313	3.90	1.59
Union	0.0394	0.0054	0.0000	7.30	
Volusia	0.0471	0.0161	0.0179	2.94	2.63
Wakulla	0.0345	0.0061	0.0294	5.62	1.17
Walton	0.0428	0.0141	0.0321	3.03	1.33
Washington	0.0225	0.0000	0.0313		0.72
State Totals	0.0600	0.0191	0.0436	3.15	1.38

Data Source:
http://www.firn.edu/doe/eias/eiaspubs/xls/esemem0506.xls

Comparison of Florida White and Hispanic High School Graduation Rates

School Year	White	Hispanic	White-Hispanic Gap
1998-1999	66.9	52.8	14.1
1999-2000	69.4	53.7	15.7
2000-2001	71.2	56.0	15.2
2001-2002	75.9	60.1	15.8
2002-2003	78.1	61.1	17.0
2003-2004	80.1	64.0	16.1
2004-2005	80.8	64.5	16.3

Data Source: Raising Student Achievement: Florida's Compelling Evidence, Florida Department of Education, May 2005